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JO ANN POWELL, by ANNA BELLE POWELL, her mother and next friend,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
NORMAN E. GOLDMAN, Administrator of the Estate of RUDOLPH SHEPHERD, Deceased,	)	
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of Jo Ann Powell, a minor, by Anna Belle Powell, her mother and next friend, against the defendant, Norman L. Goldman, Administrator of the Estate of Rudolph Shepherd, deceased, as a party defendant, for personal injuries sustained by the plaintiff on June 7, 1957, in the amount of $8,000.00. The original defendant, Rudolph Shepherd, was the driver of the automobile which struck the minor plaintiff. Shepherd died before the trial commenced in October, 1964, and Norman E. Goldman, Administrator of the Estate of Rudolph Shepherd, deceased, was substituted as a party defendant.

The defendant by this appeal raises four points in his brief. (1) The trial court erred in admitting into evidence over the objections of the defendant an exhibit which purported to be hospital records of the Cook County Hospital concerning the plaintiff, Jo Ann Powell; (2) the trial court erred in admitting into evidence over defendant's objection purported x-rays of the plaintiff taken at the Cook County Hospital because an improper and insufficient foundation was laid for their admission; (3) the trial court erred in allowing Dr. J. Francois Conte to testify to a diagnosis he made by the use of x-rays which were not produced in court, and

permitting the doctor to testify from an x-ray report which he did not prepare; (4) the court erred in overruling the objection of the defendant to the competency of the plaintiff, Jo Ann Powell, to testify.

The testimony of Jo Ann Powell related to her stay in the hospital and her pain and suffering after the accident. At the time of her testimony the original defendant, Rudolph Shepherd, had died and his administrator was substituted. The objection to Jo Ann Powell's testimony is based upon section 2 of the Evidence Act, (Ill. Rev. Stat. 1963, chap. 51, sec. 2). Her testimony related entirely to the question of damages, as do the other three points raised by the defendant in his brief.

At the close of all the evidence in the case the trial court directed a verdict as to liability against the defendant administrator. No evidence was offered on behalf of this defendant on the question of liability, nor is any error asserted on his behalf with relation to the directed verdict for the plaintiff against the defendant on the question of liability. Since the defendant by this appeal has neither raised any point on the question of liability, nor on the question of excessiveness of damages, all questions relative to liability and damages have been waived.

Where a defendant contended that the court committed several errors, as in this case, that bear only upon the question of damages, it is entirely unnecessary to consider those alleged errors where the defendant had not by any assignment of error raised the point that the amount of the verdict was excessive. Gardner v. Railway Express Agency, Inc., 274 Ill. App. 626.

In Hedge v. Midwest Contractors Equipment Co., 53 Ill. App. 2d 365, the defendant contended that the plaintiff was

contributorily negligent as a matter of law. The court there held that it was precluded from considering the jury's findings because the manifest weight question had not been raised or argued on appeal.

In Graham v. Dressen, 292 Ill. App. 15, the court held that the defendants having failed to specify in their motion for a new trial that the damages fixed by the verdict of the jury were excessive, they are not in a position to question the action of the court in refusing to strike the testimony of the plaintiff relating to the amount of damages, nor the propriety of an instruction pertaining to the question of damages. In the present case the defendant did not specify in his motion for a new trial that the damages fixed by the verdict of the jury were excessive, nor has he raised that point in his brief.

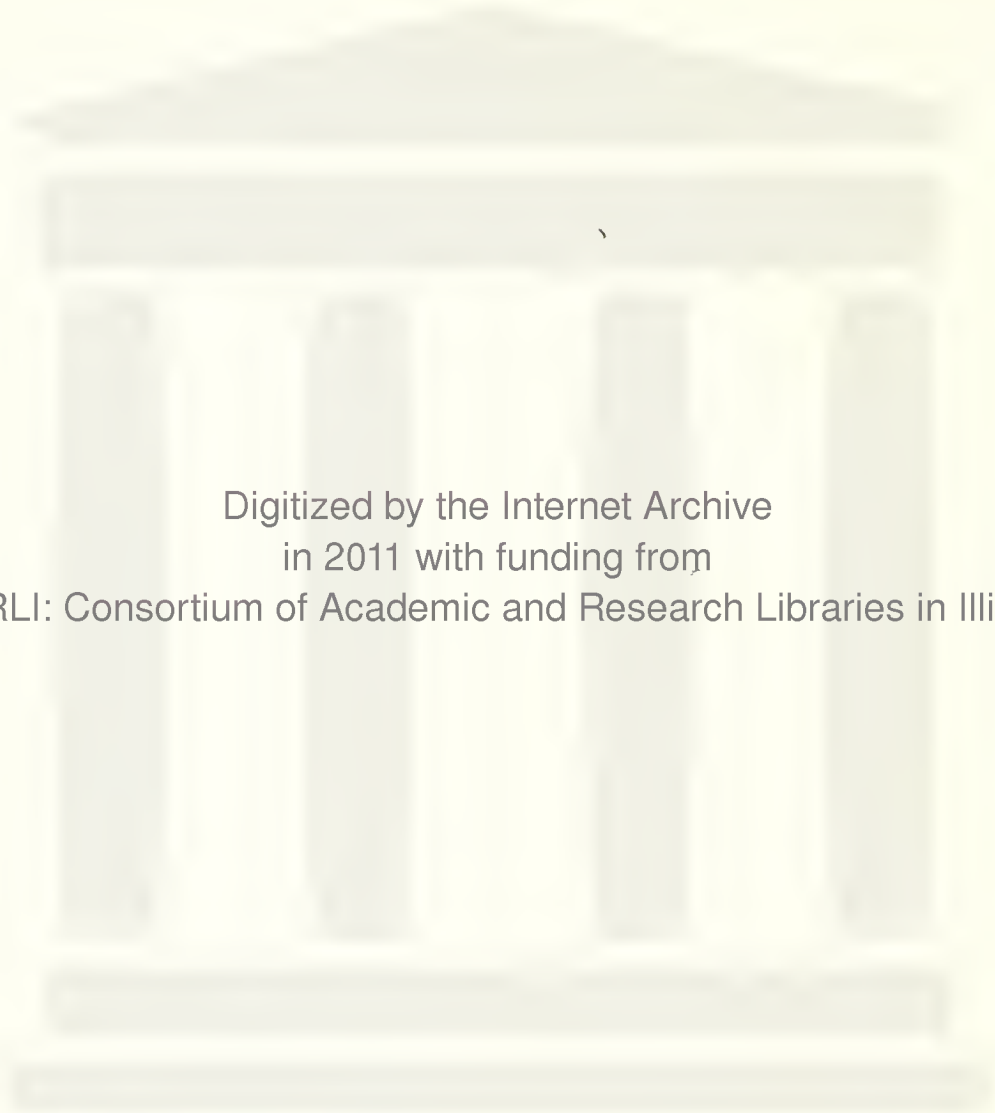
Rule 5 (2)(k) of the Appellate Court of Illinois, First District, and Illinois Supreme Court Rule 39 (1)(IV), require the appellant's brief to contain points and authorities which shall consist of the propositions relied upon in support of the appeal, and, further, that no point not contained in the brief shall be raised afterwards.

On the record before us, liability is not disputed by the defendant, nor does he contend that the damages assessed by the jury are excessive. Therefore we must conclude that he was not prejudiced by the alleged errors of the trial court which he has raised here. This court will reverse only when prejudicial errors are raised on appeal, and will not reverse for harmless errors. I.L.P. Appeal and Error, sec. 801.

Judgment affirmed.

Schwartz and Dempsey, JJ., concur.

Abstract only.



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50915

PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. WILLIE E. PRUITT, Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from a verdict of guilty of murder and a judgment entered thereon August 23, 1961 in the Circuit Court of Cook County. The appellant urges as grounds for reversing the judgment entered below that he was not proved guilty beyond a reasonable doubt, that the facts at most show guilt of voluntary manslaughter, and that the Court below was in error in not instructing the jury on voluntary manslaughter.

The decedent and the appellant were acquaintances, having first met some months before the killing took place. The appellant had served in the armed forces during World War II and was discharged in 1944 with a 100% mental disability for head wounds received in the South Pacific. This mental disability had been reduced to 30% by the time the killing took place. Because of his disability, the appellant was periodically a patient at the Veterans Administration Hospital at Downey, Illinois.

In May, 1960, Pruitt had received commitment papers and was on his way to the Downey Hospital when he met the decedent, Johnnie Jenkins. Jenkins had a car and offered to drive Pruitt to the hospital some 46 miles away. It was agreed that the appellant would pay the decedent $9.00 for the ride, and he did pay him $4.00 that day. Jenkins drove Pruitt, Pruitt's wife, Alice, and one other man to the hospital. Pruitt checked into the hospital and the other three returned to Chicago. The appellant did not leave the hospital until August, 1960.

Meanwhile, in May or June, Jenkins saw Mrs. Pruitt on the street and asked her for the balance of $5.00 due to him for the ride

to the hospital. There was testimony that he used foul language at this time. Mrs. Pruitt said she would pay him as soon as she picked up a check at the Veterans Administration office. When Jenkins continued to press her for the money, she went to an uncle of her husband's and obtained the $5.00 which she gave to a friend to give to the decedent. The friend testified that he gave the money to Jenkins and reprimanded him concerning his use of profanity. He said that the decedent apologized to him.

The appellant testified that upon his release from the hospital he met the decedent on the street. He said Jenkins wanted to apologize to him for swearing at his wife. The appellant said he understood and stated that no apologies were necessary.

According to the evidence, the appellant and the decedent did not see each other again until December 17, 1960, the date of the killing. Upon meeting each other that day, they went into a store where Jenkins purchased a bottle of wine. They then walked into an alley off 49th Street where they drank the wine. According to Pruitt, they stood along a curb by an enclosed newsstand, the appellant's back was toward the street where cars were parked, blocking access to the street at that point. He said that Jenkins asked him why Pruitt's wife did not speak to him any more. Pruitt said he told Jenkins that she was still upset about Jenkins' use of profanity toward her the previous summer. Pruitt claims he was backed into a corner formed by the newsstand and the parked cars. He said Jenkins made an obscene remark about his wife and then hit him. Pruitt said the decedent then grabbed him by his coat and slammed him against the newsstand. Pruitt then drew a kitchen knife which he said his son had found and given him earlier that morning, and stabbed Jenkins three times. Jenkins fell to the ground, and the newspaper vendor who was in his stand at this time, helped him to his feet. The decedent walked to the curb of the street and there fell dead.

The newspaper vendor testified he heard a noise which sounded like a punch. Apparently he heard no one being slammed up against the side of his booth. The coroner's pathologist reported that Jenkins weighed 190 pounds and was six feet, one inch tall. Pruitt testified he weighed 160 pounds and was five feet, nine inches tall.

After the slaying took place, Pruitt went home and told his wife what had happened. It is said he told his wife he was going to go to the police, but that Mrs. Pruitt told him not to go. There was testimony that a cousin of Pruitt's told him the police had orders to shoot him on sight. Pruitt went to the Downey Hospital where he was apprehended by the police the following day. Pruitt gave a statement to the police that was consistent with his testimony at the trial except that in the original statement he said the decedent hit him with his fist, and at the trial he stated that Jenkins had a bottle in his hand.

We hold that there was competent evidence to support the verdict that defendant was guilty beyond a reasonable doubt. The appellant admitted killing the decedent. People v. Slaughter, 29 Ill.2d 384, 194 N.E.2d 193 (1963). The jury need not believe his claim of self-defense. People v. Gilbert, 12 Ill.2d 410, 147 N.E.2d 44 (1957). This case is distinguishable from People v. Honey, ____Ill.2d____, ____N.E.2d____(1966) (Gen. No. 50443), where another division of this court reversed a conviction of voluntary manslaughter. There the defendant testified that the decedent had drawn a gun on him once before, and that he had run away. Later, when the decedent tried to attack him again, the appellant had tried to run away but was unable to make his escape. Apparently there was no one nearby whom he could have summoned for help. The appellant then picked up a bed rail from the ground and jabbed the decedent in the jaw, killing him.

In the case at bar, there was a newspaper vendor a few feet from the appellant and the decedent. There was no testimony of bruises or injuries found on the appellant at the time he was arrested. We also note that the appellant was carrying a weapon. While this in itself may not have great weight in determining the facts in the case before us, it still reasonably could be said to have some weight in determining whether the appellant was free of aggressive conduct. Taking the record as a whole, we believe the evidence is sufficient to support a conviction for murder.

The appellant urges that the trial court erred in not giving a manslaughter instruction to the jury. It is clear that the appellant offered no instruction on manslaughter, apparently choosing to go to the jury on the basis of a murder charge. It is clear that the Court below was not in error in not giving an instruction that was not requested. People v. Green, 27 Ill.2d 39, 187 N.E.2d 708 (1963); People v. Tomaszewski, 406 Ill. 346, 94 N.E.2d 154 (1950); People v. Cavanaugh, 18 Ill. App.2d 279, 152 N.E.2d 266 (1957).

This Court may reduce the punishment imposed by the trial court by the authority of §121-9(b) (4) of the Code of Criminal Procedure, (Ill. Rev. Stat., 1965, Ch. 38 §121-9(b) (4)). In this case, the appellant had no previous record. The jury set his sentence at 30 years in the penitentiary. We feel this sentence is excessive. The sentence is reduced to 14 years and the judgment of the Circuit Court, as modified, is affirmed.

JUDGMENT AFFIRMED AS MODIFIED.

LYONS, J., and BURKE, J., concur.

51028

ARTHUR REESE and EMILY REESE, his wife, Plaintiffs-Appellees, v. VILLAGE OF MOUNT PROSPECT, a body politic and corporate, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Plaintiffs filed this action for a declaratory judgment that a zoning classification of the Village of Mount Prospect was invalid and unconstitutional as applied to their real estate. After hearing evidence, the trial court found that the Village's R-1, single-family residence classification was unreasonable, discriminatory, confiscatory, unconstitutional and void insofar as it applied to the subject property for the reason that it precluded the operation of a proposed restaurant and other commercial uses permitted under the Village's B-3 commercial classification. Defendant appeals.

The subject property is a tract of vacant land, containing approximately two and one-quarter acres, located on the southwesterly side of Rand Road in the Village of Mount Prospect. Rand Road is a heavily traveled four-lane divided state highway running in a south-easterly-northwesterly direction. The subject property has an eastern frontage of approximately 415 feet on Rand Road and a western frontage of some 359 feet on Louis Street. It is approximately 430 feet deep along its southern boundary, Thayer Street, and approximately 166 feet along its northern boundary. To the north of the subject property is a small vacant lot, followed by a triangular tract developed as a gasoline filling station. To the west of the filling station, and to the northwest along Rand Road, are single-family residences and the Gregory Elementary School. The subject property is bounded on the west and the southwest by the Busse Elementary School and single-family

residences and on the southeast along Rand Road by an agricultural tract which is zoned R-1. The entire portion of the Village of Mount Prospect lying southwest of Rand Road, from Highland Avenue on the north to Central Avenue on the south, is zoned and partially developed single-family residence, except for a small area some one-quarter mile southeast of the subject property, south of Henry Street and east of Edward Street, part of which is B-3 commercial and part of which is R-3 multiple-family dwelling.

The property on the northeast side of Rand Road is partly within the Village and partly within an unincorporated area of Cook County. On the northeast side of Rand Road directly opposite the subject property are a pancake house, a bowling alley and a movie theater, all of which are in a B-3 zone and set back from Rand Road. The north line of this B-3 zone lies slightly northeast of the subject property. A vacant tract north of the B-3 zone is in the Cook County R-4 single-family residence district, under which zoning single-family residences may be developed on 10,000 square foot lots. All other property on the northeast side of Rand Road lying north of the B-3 zone and east of Louis Street, if extended, is in the Cook County R-4 classification or the Village R-1 classification. A triangular parcel lying south of Gregory Street on the northeast side of Rand Road and west of Louis Street, if extended, is in a B-2 restricted service district. A portion of this area is improved with a doughnut restaurant. North of Gregory Street, if extended, and northeast of Rand Road, is a small parcel west of Louis Street which is zoned B-2, but the major portion of that area is in the Cook County R-4 district. The subject property is therefore surrounded on the north, south, and west by single-family zoning classifications, as well as by a substantial single-family district to the east across Rand Road.

Plaintiffs entered into a contract to sell the subject property to William Knapp for $96,000, conditioned upon a rezoning of

the property for B-3 commercial uses. Plaintiffs' application for a rezoning of the property was allowed by the Zoning Board of Appeals, but was denied by the Village Board. Plaintiffs then filed this action for a declaratory judgment in the Circuit Court.

Plaintiffs' first witness was George H. Kranenberg, a planning and zoning consultant. He prepared a map showing existing land uses in the area surrounding the subject property and the zoning classifications under the Cook County and the Village zoning ordinances. In his opinion the highest and best use of the subject property, from a planning and zoning standpoint, would be for any of the uses permitted under the B-3 classification of the Village ordinance. His opinion was based on the character of the area, and the fact that Rand Road is a heavily traveled state route which is characterized by business and commercial establishments. He believed the subject site took its character from the trend of development within this area, both to the northeast and to the southwest of the subject property. He stated that there were extensive business uses across Rand Road from the subject property.

Kranenberg thought the only deterent effect which would result from a rezoning would be to the homes directly to the west of the subject property and to the first and possibly the second home to the south along Thayer Street, which he thought would be only minor. He stated that wherever a change in district boundaries occurs, there is a certain amount of deterent effect regardless of what the uses might be. He further testified that there is a difference in the character of traffic between a residential area and a business area. Kranenberg had no idea how much traffic would be generated by the desired commercial uses, but he stated that there would be more cars generated than if the subject property were developed under its present zoning. The witness assumed that the merchandise for these establishments would be delivered by trucks but did not know whether the trucks would use the

residential streets, such as Louis and Thayer Streets, or Rand Road.

William Knapp, testifying for the plaintiffs, stated that he desired to build a drive-in restaurant equipped with automatic food dispensing machines on the north end of the subject property, and a barber shop, a beauty shop and possibly a cleaning pick-up station on the south end. The restaurant building would be 4,200 square feet in area and could serve 78 persons at a time, with a turnover of vehicles at 58 to 100 per hour. The proposed operating hours would be daily from 11:00 A.M. until 11:00 or 12:00 at night. Knapp surmised that during a 12 hour day in July at least 250 vehicles would enter and leave the restaurant's premises and that there would be a limit to the number of automobiles which could be served at any given time. Knapp also proposed three driveways from Rand Road to the property, two for the restaurant and one for the other stores.

The final witness for the plaintiffs was Richard W. Manke, a real estate broker. He testified that under the R-1 classification, only four or five lots could be developed on the subject property. In his opinion the value of the entire parcel, if put to a residential use, would be between $8,000 and $10,000. He estimated the value of the property at approximately $100,000 under a B-3 zoning. Manke further testified that the depreciatory effect on the surrounding residences would be negligible and that the homes most affected would be six homes west of the subject property which are in the $16,000 to $16,500 bracket. In his opinion the highest and best use of the subject property was for commercial purposes and, in particular, for those purposes allowed under the Village's B-3 classification. In arriving at this opinion, Manke said that he took into consideration the fact that the subject property fronted on Rand Road which was not suitable for residential purposes, that a service station existed to the north of the subject property, that the greatest frontage of the subject property is on Rand Road, and that Rand Road generally has a commercial character.

Eugene Baughman, a city planning and zoning consultant, testified as an expert witness for the Village. In his opinion, the highest and best use of the subject property was single-family residences as permitted under the Village's R-1 classification. In arriving at that opinion he took into consideration the land uses and the zoning in the area of the subject property, the highway system in the area, the location of the subject property, the existence of Rand Road (which separates the business uses on the east side of Rand Road from the predominantly single-family uses on the west side,) the non-conforming condition of the filling station to the north of the subject property, and the design of Louis and Thayer Streets, which he stated were not suitable for anything other than single-family development. He also took into consideration the adaptability of the land for single-family development in a manner similar to that to the northwest along Rand Road in Des Plaines and the new home at the northwest corner of Thayer and Louis Streets, just west of the subject property.

Baughman thought the development of the property in question as a business use would have an adverse effect on the property in the surrounding area. He stated it would be an intrusion into the area which would be a type of spot zoning and would have an impact upon the neighborhood school conditions, traffic and residential buildings. He testified that the subject property is desirable and suitable for single-family homes and that single-family residences have been built in the last 10 years in the two-mile R-1 strip along the southwest side of Rand Road. Baughman further testified that the Busse Elementary School would be affected by the proposed uses because the school fronts on the south line of Thayer Street; a commercial use would make it possible for commercial vehicles to travel on Thayer Street in the path of the students, some 200 of which ride bicycles to school. He further stated that in Des Plaines, within one-half mile of the subject

property, there is new single-family construction along, upon and near Rand Road. He said that it is possible to develop the single-family residential subdivision on the subject property with lots which do not face Rand Road.

Bernard Hemmeter, the Village Engineer, testified he reviews proposed subdivision plats. He prepared a plat of the subject property laid out for a residential subdivision, containing 7 lots, none of which faced Rand Road. He stated the plat was approved by the Planning Commission and the Village Board, and conformed in all respects to the Village ordinances. He calculated the cost of improvement for the 7 lots at a total of $8,700, based upon his knowledge and familiarity with the cost of improvements in subdivisions of this nature within the Village. The lot sizes on the plat range from 8,160 to 14,000 square feet, all complying with the Village's minimum requirement of 8,125 square feet.

Raymond Wright, a real estate appraisor, testified as an expert witness for the Village. He pointed out that the land use surrounding the subject property from the Gregory Elementary School, approximately one-quarter mile northwest, to Henry Street on the southeast is all single-family residence except for a pump house in the subdivision west of the subject property and the filling station to the north which was developed under the Cook County zoning ordinance prior to the incorporation of the area by the Village of Mount Prospect. Wright made a count of the single-family residences southwest of Rand Road and found there were over 200 in the area from Central Road to Gregory Street and from Rand Road to Elmhurst Road. The witness thought the subject property was suitable for development with single-family homes and that its value for this purpose was $30,000. His opinion was based on the 7 lot subdivision plat approved by the Village and submitted by witness Hemmeter. Wright derived his estimate of value after deducting the costs of improvement, title costs, selling costs and other miscellaneous expenses. He thought the 7 lots could sell for

$6,000 and that homes in the $20,000 to $25,000 bracket could be built.

Leo G. Wilkie, a traffic engineer, also testified for the Village. He made a survey of the vehicular traffic conditions in the vicinity of the subject property. In 1963, the traffic for a 24-hour, two-way count on Rand Road was 14,300 vehicles. He stated the volume of traffic would conflict with the drive-in restaurant traffic. Wilkie testified that Louis and Thayer Streets would also be affected by the proposed restaurant because there would be a gravitation of traffic toward the restaurant, some 60 to 70% of traffic for such type restaurant being local traffic. He said that construction of the proposed drive-in would have a dual effect on traffic on Louis and Thayer Streets because traffic volume would increase and the hazards would correspondingly increase. Wilkie further testified that the number of automobiles attracted to this type of commercial establishment, depending upon the type of day, would be from 700 to 1,700 per day, or 1,400 to 3,400 trips per day. He said the proposed change would alter the existing character of traffic on the residential streets around the subject property. He further stated that, in view of the physical characteristics of Rand Road, the creation of three additional driveways to service the subject property would produce a total of 15 automobile conflicting points and 9 automobile merging points, creating substantial traffic hazards.

Defendant maintains that plaintiffs have failed to overcome the presumption of validity attaching to the Village's R-1 zoning classification ordinance. We agree.

It is a fundamental proposition that the party attempting to overcome the presumption of validity of a zoning ordinance must do so by clear and convincing evidence. If any room exists for a reasonable difference of opinion, the court should not substitute its judgment for that of the legislative body. Exchange National Bank v. County of Cook, 25 Ill.2d 434. As was stated in the case of Trendel v.

County of Cook, 27 Ill.2d 155, at page 161:

> "Our case law is replete with restatements of the rules that a zoning ordinance is clothed with a presumption of validity; that courts will not interfere with the discretion of the legislative bodies charged with demarking the use of property, except where there is a clear abuse of discretion; and that the property owner challenging the ordinance has the burden of proof to establish that it bears no relationship to the public health, safety, morals or welfare."

The party attacking the validity of a zoning ordinance must not only establish that the property could reasonably be classified otherwise, but must show that the existing classification is clearly unreasonable and a clear abuse of discretion. Jans v. City of Evanston, 52 Ill. App.2d 61, 67-68. In deciding such questions it is well settled that each case must be determined upon its own facts. Berger v. Village of Riverside, ____Ill. App.2d____, 216 N.E.2d 479.

In the case at bar, the evidence shows at best that there exists a difference of opinion as to whether the present zoning should be adhered to or whether the subject property should be rezoned for commercial purposes. Plaintiffs are under contract to sell the subject property for $96,000, subject to rezoning. Although evidence exists that the property could be worth some $100,000, that figure represents the value of the property if rezoned for commercial uses. The fact that plaintiffs' land would have a greater value if the existing ordinance were declared invalid is not in itself decisive of whether a rezoning should be allowed. Bright v. City of Evanston, 57 Ill. App.2d 414. It is true in nearly every zoning case in which the use of property is limited, that the subject property would be worth more if the owner were allowed to invalidate the existing zoning and build under a different classification. In Exchange National Bank v. Village of Niles, 24 Ill.2d 144, the court sustained a single-family classification against a multiple-dwelling rezoning request even though the evidence showed that the property was worth three times more for

multiple-dwellings than it was for single-family purposes. On the other hand, evidence exists in the case at bar that if the subject property were developed within its present zoning classification, the value of the property, based upon a 7 lot subdivision, would be $30,000. Another factor to be taken into account if the subject property were rezoned for the desired purposes, is the cumulative depreciation on the nearby residences which the evidence shows would be in the vicinity of $80,000.

Plaintiffs argue that the character of Rand Road which abuts the subject property, and the commercial uses lying northeast of Rand Road, render the single-family classification of the subject property unreasonable. That fact, however, is not determinative of whether the R-1 zoning classification is reasonable or unreasonable. The case of Urann v. Village of Hinsdale, 30 Ill.2d 170, involved a single-family zoning on subject property which abutted railroad tracks and industrial property to the north. The court there stated that the plaintiffs' property was surrounded on three sides by an extensive single-family residence district and that the predominant use of the lots in that area complied with the classification. The court further stated that the railroad tracks and the industrial area to the north of the subject property did not, in themselves, fix the character of the subject property nor cause its classification to be unreasonable.

The evidence shows that Rand Road is a heavily traveled state highway bearing a 50 mile-per-hour posted speed limit and that rezoning for commercial purposes would greatly increase traffic, thereby increasing traffic hazards. The proximity of the subject property to the residential area and the two elementary schools is also significant in the light of the increase in traffic as forecasted. Merely because the subject property fronts on a heavily traveled street does not of itself render a single-family classification invalid, nor does the fact

that the property is near or adjoins commercial property render the classification invalid. Jans v. City of Evanston, 52 Ill. App.2d 61, 71; LaSalle National Bank v. City of Chicago, 4 Ill.2d 253. It is well settled that zoning must begin somewhere and end somewhere. Chicago Title and Trust Co. v. County of Cook & Village of Mount Prospect, _____Ill. App.2d_____, 216 N.E.2d 216. The subject property in the case at bar is located within an R-1 classification, and the entire area southwest of Rand Road, with a few minor exceptions, is characterized by a homogenous, compact and uniform residential area. If the property were developed in conformance with the existing zoning, as the evidence shows, none of the residential lots would face Rand Road or business uses.

The subject property is bounded on the north by the gasoline filling station, which is a nonconforming use under the Village's zoning ordinance. However, this classification will remain in force only so long as the property remains occupied by a filling station, for the reason that it was constructed prior to the time the area was incorporated into the Village and when the area was zoned by Cook County for commercial uses. The only other nonconforming use in that area is a small section some one-quarter of a mile to the southeast of the southerly line of the subject property developed with filling stations and other commercial services. Other than these two small commercial tracts, the entire area southwest of Rand Road is either developed as or zoned as single-family residences.

The evidence in the case at bar shows that there is only a difference of opinion as to the highest and best use of the property. This, however, falls short of the requirement upon plaintiffs to sustain the burden of proof to demonstrate the invalidity of the zoning ordinance, and the court will not interfere with the classification given to the property by the Village. LaSalle National Bank v. Village

of Lombard, 64 Ill. App.2d 211, 216-217.

THE JUDGMENT IS REVERSED AND THE CAUSE REMANDED WITH DIRECTIONS TO ENTER JUDGMENT FOR THE DEFENDANT AND AGAINST THE PLAINTIFFS.

BRYANT, P.J., and LYONS, J., concur.

50669

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM
	)	
v.	)	CIRCUIT COURT,
	)	
JAMES STUCKEY,	)	COOK COUNTY,
	)	
Defendant-Appellant.	)	CRIMINAL DIVISION.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

After a jury trial, defendant James Stuckey and his co-defendant, John Lee Ikerd, were found guilty of armed robbery. Stuckey was sentenced to the penitentiary for a term of 10 to 20 years. Separate appeals were filed by each defendant in the Illinois Supreme Court. The conviction of Ikerd was affirmed (People v. Ikerd, 26 Ill.2d 573). The appeal of Stuckey was transferred to this court by the Supreme Court. On appeal, defendant Stuckey asserts: (1) trial errors; (2) that "the uncorroborated confession of an accused is insufficient to convict"; and (3) that he was not proved guilty beyond a reasonable doubt.

On March 5, 1960, shortly before 8:00 P.M., Fred Lux was walking in the vicinity of 14th and California Avenue in Chicago. Two men walked past him, and he was struck on the head from behind and dragged into a small, lighted vestibule in a nearby building. One man stood in front of Lux and held a gun against him while the man in the rear removed his billfold, watch and cigarette lighter. Lux was able to get a good look at the man with the gun who faced him, but never saw the man behind him. The man in front told the other one to leave and that he would "watch him (Lux) so he can't follow us." The man in back left and was followed thirty seconds later by the man with the gun. Lux then telephoned the police from a nearby house, and they arrived shortly.

Lux and Officers Lenz and McLaughlin began cruising the streets in a police car. They saw two men crossing the street, one of whom fitted the description given by Lux. When the police car neared the men, they separated and ran after the officers ordered them to halt. Defendant Stuckey was caught, while the other got away. At the station, Lux was unable to identify Stuckey.

On March 8, 1960, in the course of the investigation of the Lux robbery, the police arrested Ikerd and found a loaded .45 automatic pistol in his apartment. At a line-up, which included Ikerd and Stuckey, Lux identified Ikerd as one of the men who robbed him. After the line-up and in the detective room, Officers Cooper, Preston, Anderson and Lenz questioned Stuckey and Ikerd. Officer Lenz testified that "they freely told their part in this robbery, but refused to give a statement. * * * Ikerd told that he had, that he was the taller man of the two that night, and that he had the .45 caliber revolver; that the second man was James Stuckey; that after having robbed the complainant Stuckey left and Ikerd remained, told him that he would remain to cover him. Stuckey left and headed north on California, crossed into the park. Ikerd walked down and waited at a corner. * * * Ikerd was then asked where he went and he stated through Douglas Park. I asked him at that time if he recalled that evening, the 5th of March, when Officer McLaughlin and myself approached him at the corner of Albany and Roosevelt. He stated that he did. I then asked him why, when I ordered him to halt and fired a warning shot in the air, that he continued running and got away. He stated that he could not stop at that time because he had the .45 caliber on him. * * * After hearing Ikerd tell us about this, Stuckey admitted his part. * * * He said that he was with Ikerd on this robbery, that he was the second man. And I

then questioned him, I then asked him why, on the night that I had arrested him after this robbery, that he denied his part, and he stated because the man could not identify him."

Police Officers Cooper and Preston corroborated the testimony of Officer Lenz as to the interrogation of Ikerd and Stuckey after the line-up at the station. Before trial, defendant was furnished with a list of witnesses to the oral confession.

Another witness for the State was William E. Hall, a guard at the Chicago Housing Authority building near 14th and California Avenue. Hall testified that on March 5, 1960, at 7:45 P.M., he was robbed by a man carrying a silver-plated automatic, bearing a strong resemblance to People's Exhibit 1, the gun found in Ikerd's apartment. In a line-up four days later, Hall identified the assailant as James Stuckey.

Defendant Stuckey testified and denied the robbery and the oral confession.

Considered first is the defendant's contention that it was error to receive in evidence defendant's alleged confession for the reason that it was uncorroborated. Defendant argues, "In this case there is no evidence which deals directly with the facts contained in the allegedly made confession. Thus, there are no witnesses to the act and no recovery of items taken. Fred Lux readily admits his inability to identify Stuckey." Defendant's authorities on this point are grounded on the principle, "It is elementary that the corpus delecti cannot be proven by the confession of the defendant alone." (Wistrand v. The People, 213 Ill. 72, 79, 72 N.E. 748 (1904).) This contention is without merit here. There was direct and positive evidence of the robbery--the corpus delecti--plus the oral confession of both participants in the robbery, Ikerd

and Stuckey. This was enough proof to establish defendant's guilt.

In People v. Ikerd, our Supreme Court held that the confession of Ikerd, openly and affirmatively assented to by defendant Stuckey, was properly admitted against them in their joint trial. That ruling is controlling here. The testimony of Lux established the ultimate fact--the robbery, and defendant admitted his participation in it in the presence of witnesses. His later denial during the trial presented a question for the jury.

Defendant next contends that the court erred in admitting the testimony of William Hall regarding his robbery, which took place about fifteen minutes before the robbery of Lux. At the trial, Hall identified Stuckey as one of the armed robbers who had a silver-plated Colt automatic exactly like the one in evidence. Hall stated he had carried one like it for seven years in the army.

As stated in People v. Tranowski, 20 Ill.2d 11, 169 N.E.2d 347 (1960), at p. 16:

> "It is the general rule that evidence that another or other crimes were committed by a defendant, wholly independent of and disconnected from the crime for which he is being tried, is not admissible. * * * But a corollary of the rule is that evidence, relevant to the main issue, which serves to place a defendant in proximity to the time and place, aids or establishes identity, and tends to prove design, motive or knowledge, is admissible."

The testimony of Hall was competent and properly admitted. As said in People v. Tranowski, at p. 16:

> "[T]his evidence served to place defendant in the area at the correct time and establish a scheme or design which was strikingly similar to the offense charged in the indictment."

We find no error here.

Defendant finally contends that the testimony of the police officers regarding the alleged oral confession was incompetent and

contradictory, hence there was a failure to prove defendant guilty beyond a reasonable doubt. The inconsistencies pointed out are primarily directed to the testimony of the three police officers who differed as to who was present at the time the alleged oral confession was made.

Before the trial, the State provided defendant with a list of witnesses to the oral confession of defendant. The list named Lenz, Cooper, Preston and Anderson. Of these four, Anderson was not called because he was on furlough at the time of the trial. Officer Parks testified as to the arrest of Ikerd, but said he was not present at the confessions. We find no error in not including Parks in the list. Although there is some discrepancy in the testimony of the officers as to those present, no surprise or unfairness is pointed out, and there was no variance in their testimony as to the substance of the alleged confession of defendant.

We conclude the testimony of Lux as to the robbery, the oral accord of defendant with the confession of Ikerd, buttressed by the testimony of Hall as to defendant Stuckey robbing him in the immediate area and at the same approximate time, with a weapon "exactly" the same as the one in evidence, was sufficient proof of the offense beyond a reasonable doubt. Therefore, the judgment of the Criminal Division of the Circuit Court of Cook County is affirmed.

AFFIRMED.

KLUCZYNSKI, P.J., and BURMAN, J., concur.

Abstract only.

NO. 64-66.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. SHERMAN STEWARD, Defendant-Appellant.	)	Appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois.

Goldenhersh, P. J.

The defendant, Sherman Steward, was tried by jury in the Circuit Court of St. Clair County and convicted of the crime of Armed Robbery (Ch. 38, sec. 18-2, Ill. Rev. Stat. 1965). After being properly advised of his right to offer evidence in mitigation, defendant waived the right so to do, and was sentenced to the penitentiary for a term of not less than 8 nor more than 15 years. The Public Defender of St. Clair County gave notice of appeal and upon the request of defendant the Public Defender was given leave to withdraw and this court appointed counsel to prosecute the appeal.

Defendant urges several alleged errors as ground for reversal. As to defendant's first contention, the opinion in People v. Blanchett, 33 Ill. 2d 527, is controlling and no further discussion thereof is required.

Defendant assigns as error, the failure of the trial court to sustain defendant's objection to the answer of the witness, Gay Francis, to a question propounded by the assistant State's Attorney who tried the case for The People. In response to a question asking what had occurred, the witness replied "Well, we experienced an armed robbery". Defendant contends that this was a conclusion, and the court erred in permitting the witness to testify to the ultimate issue in the case. The testimony of all the witnesses, including defendant, is to the effect that an armed robbery was committed. Where the defendant admits that there was an armed robbery, permitting the answer to stand, was not error.

Defendant's final contention requires a brief review of the evidence. On the afternoon in question, two men entered the office of The Limerick Finance Company in East St. Louis. After a brief discussion with a receptionist they were directed to a booth where they were joined by the assistant manager of the office. They inquired about making a loan, and while the assist-

ant manager was preparing a loan application, one of the men drew a revolver. One of the men, later identified as defendant, then went to the front of the office and the other, the man with the gun, directed the assistant manager to get the money out of the cash drawer. All the employees in the office were ordered to lie on the floor, and the men left with cash and a number of checks.

The police were called, and thereafter several of the employees recognized a photograph of the defendant as being one of the two men involved. Later they were shown four men in a police "lineup" and identified defendant as one of the robbers. The testimony shows that the other man was the one with the gun.

Defendant was arrested in East St. Louis 13 days after the robbery. Defendant was taken to the police station and on interrogation, admitted his participation in the robbery.

Defendant testified that on the afternoon in question he was in a tavern in East St. Louis, when a "blond-headed" fellow asked him if he had a car. Defendant replied that he had his wife's car, they had several drinks, when the other man, who told him his

name was Jim, suggested they go to another tavern. They left in the car, and drove to a tavern directly across the street from the office of Limerick Finance Company. They had a drink in this tavern, defendant suggested that he must leave in order to meet his wife at her place of employment, Jim suggested another drink, defendant acquiesced, Jim suggested they leave by the rear door which opened into an alley, upon entering the alley Jim stated they were going to rob the finance company office, defendant objected saying "I'm not going in there", whereupon Jim drew a revolver and said to defendant, "You're going in there and you're going to ask for the manager". Defendant then testified as to what occurred in the finance company office, and his version of what transpired was substantially the same as that of the witnesses for The People. He stated further that he cooperated with Jim because he feared that unless he did so, he or the people in the finance company office would be hurt or killed. After the robbery Jim gave him $300.00 and he never saw him again. Defendant admitted that in the statement made to the police, he made no mention of his being forced to participate in the crime because every time he tried to explain

the occurrence the police called him a liar.

There is nothing in the record to suggest that the defendant's statement was not voluntarily given, nor does defendant suggest duress or coercion. The police officers testified that defendant was told that it was not compulsory to make a statement and in response to a question by defendant, he was told he could have a lawyer.

From a review of the record it is apparent that the issue of defendant's guilt was a fact question for the jury. In view of the positive identification of the defendant and his admission of involvement in the robbery we cannot say that the jury was not justified in rejecting his explanation of why he participated in the commission of the offense. There is no reversible error and the judgment is affirmed.

The court commends and thanks appointed counsel for an able presentation of the appeal.

Judgment Affirmed.

Concur: Hon. George J. Moran

Concur: Hon. Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

d June 29, 1966

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NO. 66-10.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Writ of Error to the Circuit Court of St. Clair County, State of Illinois;
Defendant in Error,	)	
vs.	)	
CARL BELLIS,	)	Honorable J. E. Fleming, Judge Presiding.
Plaintiff in Error.	)	

Goldenhersh, P. J.

The defendant, Carl Bellis, and Bobby Newcombe were tried by jury in the Circuit Court of St. Clair County and convicted of the crime of attempt. Ch. 38, sec. 8-4, Ill. Rev. Stat. 1965. The indictment charged defendant and Newcombe, with intent to commit the offense of Armed Robbery, attempted by threatening the imminent use of force and while armed with a dangerous weapon to rob Gary Coleman. A post trial motion was overruled and defendant was sentenced to the penitentiary for a term of not less than 8 nor more than 14 years. The Supreme Court issued its writ of error, appointed counsel for defendant, and transferred the cause to this court. No appeal is pending for Newcombe.

As ground for reversal, defendant argues that the evidence

does not prove him guilty beyond a reasonable doubt.

The complaining witness, Gary Coleman, testified that he lived next door to Don Newcombe, a brother of Bobby Newcombe. Mr. Coleman lived alone in a small house containing two rooms and a bathroom. Two nights before the date on which the attempted robbery occurred, Coleman saw Bobby Newcombe sleeping in his car in his brother's driveway. He invited Newcombe to spend the night in his house, and he slept there that night and the following night.

On the night on which the offense was committed, Bobby Newcombe and the defendant came to Coleman's home and asked him for some beer. They refused the offer of two cans of beer, left and returned with a carton containing six cans of beer. They drank the beer and left. Later that evening, as Coleman was going to bed, defendant and Bobby Newcombe returned. Defendant had a gun; he placed the gun against Coleman's forehead and told him they wanted his money. Coleman grabbed for the gun, and it went off wounding him in the abdomen; defendant told Newcombe to grab Coleman's trousers and defendant and Newcombe left. Coleman was also struck in the head, suffering a cut which required sutures, but it is not clear from the record when or how his head was injured.

After defendant and Bobby Newcombe left his house, Coleman went out into his yard, called for help, his neighbor, Don

Newcombe, called an ambulance, he was taken to St. Mary's Hospital in East St. Louis where he was confined for three weeks.

The defendant and Bobby Newcombe were arrested in Iowa City, Iowa, waived extradition, and were returned to St. Clair County. Paul Haas, a deputy sheriff testified that he and another St. Clair County deputy sheriff drove to Iowa City for the purpose of returning defendant and Newcombe to Illinois, and that both defendant and Newcombe denied having committed the offense. Haas stated that after defendant and Newcombe were lodged in the county jail, Coleman was brought to the jail, defendant, Bobby Newcombe and two other prisoners were lined up and Coleman identified defendant and Newcombe as the men who had attempted to rob him.

On cross examination Coleman denied that he had ever told anyone that he did not know who shot him. Bill Newcombe, another brother of Bobby Newcombe testified that he visited Coleman in the hospital approximately a week after the shooting, at which time Coleman told him he did not know who shot him.

Defendant did not testify. Bobby Newcombe testified that on the evening in question he was on his way into his brother's home, with defendant, when Coleman called him and asked him to go downtown to a tavern with him. He stated that the three of them went to the tavern, drank some beer and he then drove

Coleman home. He further testified that he and defendant left East St. Louis that same evening and drove to California. He intended to go to Mexico and have his car, a 1955 model, reupholstered. He stated a substantial saving could be effected because the cost of the work in the United States would be three times as much as the cost of having it done in Mexico. He denied that he or defendant could have committed the offense, because at the time of the occurrence they were driving west toward Kansas City.

On cross examination of Coleman he testified that there was a night light on in the room at the time of the attempted robbery, that it "lighted up pretty good" and he could see defendant and knew it was he who had the gun.

Identification by one witness who had ample opportunity to observe the accused will sustain a conviction. People v. Mack, 25 Ill. 2d 416. That the accused perpetrated the crime with which he is charged must be proved beyond a reasonable doubt, and this is a question of fact for the jury. In The People v. Brinkley, 33 Ill. 2d 403, page 405, 211 N. E. 2d 730, the Supreme Court said: "Where the identification of an accused is at issue in a criminal case we have constantly reiterated the rule that the testimony of one witness is sufficient to convict, even though such testimony is contradicted by the accused, provided the witness is credible and viewed

the accused under such circumstances as would permit a positive identification to be made." A conviction will not be reversed on the question of identification of the defendant unless it is so unsatisfactory as to justify a reasonable doubt. The People v. Keagle, 7 Ill. 2d 408.

In our opinion the evidence of identification was sufficient to sustain the conviction and the judgment of the Circuit Court of St. Clair County is affirmed.

The Court commends and thanks appointed counsel for an able presentation of the issue on appeal.

Judgment Affirmed.

Concur: Hon. George J. Moran

Concur: Hon. Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

Abstract

No. 65-95

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

BROOKHAVEN PLAZA CORPORATION, Plaintiff-Appellant, v. COUNTY OF DU PAGE, a Body Politic and Corporate, Defendant-Appellee.	)	Appeal from Circuit Court, DuPage County.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This is an appeal from a decision of the Circuit Court of DuPage County upholding the validity of a DuPage County zoning ordinance as it applies to a parcel of property owned by the plaintiff. The subject property is the vacant Southeast corner of an 11.62 acre tract of land located in Downers Grove Township in DuPage County which is presently zoned for "B-2, General Retail District".

Plaintiff seeks to have an irregular tract with a frontage of 145.07 feet on Cass Avenue and 155 feet on Plainfield Road rezoned to "B-4, Service District" classification, to permit construction of a gasoline service station. The entire 11.62 acre tract is bounded on the South by Plainfield Road, on the North by 75th Street and on the East by Cass Avenue. On the Northeast corner of the 11.62 acre tract,

at the intersection of Cass Avenue and 75th Street is an existing gas station. The balance of the existing 11.62 acre tract is to be developed as a convenience type shopping center and will include a supermarket, liquor store, barber shop and a dry cleaning establishment. The balance of the tract will be used as a parking lot to accommodate approximately 450 automobiles.

The property to the West of the 11.62 acres is zoned residential. Immediately to the East of the subject property across Cass Avenue, there is a gas station under construction. At the right angle of the triangle on the Southeast corner of 75th and Cass Avenue, another gas station is in operation. The remainder of the triangle will be utilized by a Dog 'N' Suds Drive-In and contemplated apartment units. Cass Avenue both crosses and interchanges with the Southwest Expressway about 3/4 to 1 mile South of the subject property.

The subject site, if rezoned, will be sold to the Pure Oil Company for $48,000. Testimony for the plaintiff indicated its value as presently zoned would be between $15,000 and $17,000. There was further testimony for plaintiff that the residential property to the West and to the South was developed with the knowledge that there would be a shopping center on the 11.62 acre tract. Further testimony indicated that Cass Avenue, which in the past had been a local secondary road, will with the development of the Southwest Expressway, become a major thoroughfare. Other testimony was to the effect that the highest and best use of this property would be for that of a service station.

The Defendant produced one witness, Robert Van Treeck, a city planner since 1957. His testimony was to the effect that other than to create congestion at the intersection, the development of the property as a service station would have no other serious effect on the surrounding property, nor would it affect their values. He also testified that service stations normally draw on traffic that already exists and do not usually generate additional traffic in an area.

The County is correct in asserting that a zoning ordinance is presumed to be valid and the burden is on the plaintiff to prove by clear and convincing evidence that the ordinance as applied to plaintiff's property is unreasonable and confiscatory. Exchange Nat. Bk. v. Vil. of Niles, 24 Ill. 2d 144, 147; Martin v. City of Rockford, 27 Ill. 2d 373, 374.

As has been stated and re-stated, among the facts to be taken into consideration in determining the validity of a zoning restriction are the following: (1) existing uses and zoning of nearby property, (2) the extent to which property values are diminished by the particular zoning restrictions, (3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public, (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner, (5) the suitability of the subject property for the zoned purposes, and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property. LaSalle Nat. Bank v. County of Cook,

12 Ill. 2d 40, 46, 47; Wilson v. Village of Deerfield, 55 Ill. App. 2d 61, 65. As the property is now zoned, it can be used for some 56 business uses, including banks, retail stores, currency exchanges, food stores, fire stations, hotels, post offices and restaurants. Immediately across Cass Avenue to the East is some 80 acres zoned for service uses and, in fact, a gas station and drive-in restaurant will be located on the opposite corner of the intersection from the subject property.

The defendant County offered no testimony that the requested rezoning would in any way diminish any surrounding property values. The record indicates that the evidence to support the County's objections was solely that the gas station would increase hazards to children by creating additional points of conflict where the service station's driveway would intersect with the two highways. The County argues that the financial loss of the owners is of less importance than the benefit to the general public to be derived by not increasing the traffic congestion. This argument, however, is in conflict with the testimony of their own witness, who admitted that the service station would not generate additional traffic, but would merely draw on existing traffic. As this Court said in Davis v. City of Rockford, 60 Ill. App. 2d 325 at pages 330 and 331:

> "It is quite possible that the addition of a service station . . . will create an additional hazard. However, the danger inherent in any road over which 10,000 cars a day pass already exists and there is little reason to believe that the proposed use would substantially augment it. The effect of these uses will be minimal when compared to that of the Shopping Center, and the gain to the public by the present restrictions slight in comparison to the loss suffered by the owners, . . ."

The County further urges that Cass Avenue is a natural boundary between the districts zoned "B-2" and "B-4", urging that the property cannot under any circumstances be characterized by the two gasoline stations which already exist across Cass Avenue. This argument is defeated by the County's action in authorizing and permitting a gas station to be erected at the Northeast corner of the premises in question.

We are of the opinion that it was error to hold that the zoning ordinance of DuPage County was valid as applied to plaintiff's property. Accordingly, the decree of the Circuit Court of DuPage County is reversed.

JUDGMENT REVERSED.

MORAN, P. J. and DAVIS, J. concur.

50592

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
JOHNNY WRIGHT, Defendant-Appellant.	)	COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was tried before a jury for murder, found guilty of voluntary manslaughter, and sentenced to 15 to 20 years in the penitentiary. He appeals.

On July 16, 1962, defendant, 64 years of age, lived in the rear of a basement apartment at 3338 Giles Avenue in Chicago. The front portion of the apartment was occupied by the decedent, Mrs. Frances Tatton, 93 years of age. It appears that prior to July 16th, defendant had been confined to a hospital and upon his return to the apartment discovered several items of his personal property missing. Inasmuch as decedent also had a key to the apartment, defendant sought information from her concerning the whereabouts of his property and an argument ensued. Defendant testified that decedent proceeded to beat him over the head with her walking cane and that he took a hammer lying nearby and struck decedent on the head. Defendant further testified that he did not know how many blows he struck, but a witness who viewed decedent's body after the incident stated that she had several holes in her head and that her left eye was out of her head.

Defendant alleges three grounds for reversal on this appeal, namely, that the trial court improperly denied his motion for a mistrial after the prosecuting attorney commented in closing argument that defendant had been previously convicted of murder, that the trial court overstepped his bounds by acting as a prosecutor and by making

remarks prejudicial to defendant, and that the prosecuting attorney misquoted and improperly referred to evidence in the closing argument which prejudicially reflected on defendant's character and credibility. After reviewing the record, we are of the opinion that defendant received a fair trial and that none of the grounds set forth constituted prejudicial error.

Defendant first maintains that prejudicial error was committed when the prosecuting attorney referred to defendant's 1939 conviction and incarceration for murder. It is well settled that a defendant will be treated as any other witness where he decides to testify in his own behalf, People v. Ladas, 12 Ill.2d 290, and that a prior conviction may be properly used for impeachment of his credibility. People v. Williams, 17 Ill.2d 193. The fact of the prior conviction was brought out by defendant on his direct examination. When the prosecuting attorney commented on the prior conviction in his closing argument, the jury was immediately admonished by the court to consider that fact as reflecting only on defendant's credibility. Furthermore, an instruction was given to the jury regarding the effect of a prior conviction on a witness' credibility. As to defendant's claim that a prior conviction can be admitted for impeachment purposes only by way of a properly authenticated copy of the record thereof (People v. Lane, 400 Ill. 170), it must be borne in mind that defendant established the fact of his prior conviction on his direct examination, thereby waiving this requirement of the evidentiary rule.

Defendant next maintains that the trial court engaged in improper conduct by remarks and questions which prejudiced defendant in the eyes of the jury. A reading of the record, however, shows that a number of the witnesses, including defendant, were difficult to understand, were unresponsive to many questions propounded by the attorneys for both sides, and had a tendency to be verbose and rambling.

The instances cited by defendant of the trial court's allegedly prejudicial remarks and questions clearly appear to be an effort on the part of the trial court to keep the witnesses from volunteering answers to unasked questions, to clarify matters and to maintain an orderly trial. While the court may have been abrupt in certain instances we do not feel that his actions were of such nature as to require reversal. See People v. Kalec, 22 Ill.2d 505, 512.

Defendant's final point is that the prosecuting attorney in closing argument misquoted and improperly referred to evidence in an effort to destroy the character and credibility of defendant. The record shows that most of the matters objected to on this appeal were not objected to at the trial. However, defendant's position appears to be that the prosecuting attorney sought to destroy the image which defendant attempted to present of himself as a mild-mannered person, acting solely in self-defense when he struck decedent, by telling the jury that defendant told them "a story." It is not improper for a prosecuting attorney to comment unfavorably upon a defendant where such comments are based upon the evidence or reasonable inferences therefrom. People v. Burnett, 27 Ill.2d 510, 517; People v. Sinclair, 27 Ill.2d 505, 509. The prosecuting attorney was within proper bounds in seeking to destroy the image which defendant attempted to present of himself in the light of all the evidence and especially that which showed decedent had several holes in her head and lost her left eye, indicating the number of times and the force with which decedent was struck. The prosecuting attorney also had a right to dwell upon the fact that decedent was a 93 year old woman and needed a cane to walk, whereas defendant was 30 years her junior. We do not feel that the comments of the prosecuting attorney transcended legitimate argument. People v. Burnett, 27 Ill.2d 510, 517.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

49383

PETER SKONTOS, also known as Panagiotis Skoundrianos, Plaintiff-Appellant, v. JOHN C. GEKAS; and GERARD A. SERRITELLA; and NIKITAS NOMIKOS, also known as Nick Nomikos; and STEVEN P. GIANAKAS, also known as STAVROS GIANAKAKIS, Defendants-Appellees.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a summary judgment dismissing plaintiff's suit. The complaint alleges that the defendants conspired to obstruct "the due administration of justice in Cause No. 59 S 8012 (Superior Court of Cook County, Illinois)" and prays for damages in the amount of $300,000. Plaintiff's brief, however, fails to state the facts upon which the conspiracy charge is founded. Instead, it presents a barrage of citations and ad hominem arguments—to what purpose we cannot fathom.

From defendants' answer it appears that this suit arose out of the preparation of a defense by these defendants to a prior action brought by plaintiff; that it is based on an alleged violation of his civil rights when he was summoned to give a deposition before a master-in-chancery; and that defendants abused the process of the court by serving their notice of motion for summary judgment upon plaintiff's attorney, rather than upon plaintiff. In that earlier suit, No. 59 S 8012, Superior Court of Cook County, the trial court granted summary judgment, and the present complaint accuses defendants of conspiring to bring about the defeat of the plaintiff in the former claim.

The trial court in the previous action wrote a memorandum opinion condensing the involved history which resulted in that litigation. That opinion is reprinted in defendants' answer, as is the decision of the Appellate Court affirming the lower court, 32 Ill. App. 2d 330, 177 N.E.2d 873, which found that the pleadings presented no genuine issue of fact. We have concluded that no useful purpose would be served by reiterating the course of the legal struggles waged by these parties over the past sixteen years. The only issues which require consideration relate to the constitutionality of certain provisions of the Civil Practice Act and this court's jurisdiction over such questions.

It should be here noted that on March 9, 1964, while this appeal was pending, defendant John C. Gekas filed a motion suggesting the incompetency of the plaintiff and requesting that George J. Skontos, conservator, be substituted as proper party appellant, which was allowed. On March 30, 1964, the conservator moved the substitution of Morgan, Halligan, and Lanoff as attorneys for appellant, replacing Peter Sarelas. The briefs on appeal were filed by Sarelas, and counsel for the conservator did not seek leave to file new briefs. Hence the briefs filed by Sarelas will be considered as those of the conservator.

Plaintiff contends that Sections 45(5) and 48 of the Civil Practice Act, which permit the rendition of a judgment on the pleadings, are unconstitutional. The appeal was first taken directly to the Illinois Supreme Court, which transferred it to this court, despite plaintiff's argument that such transfer in itself would be unconstitutional. The transfer of an appeal from the Supreme Court to the Appellate Court does not necessarily

mean that this court should not consider all questions raised on appeal, including constitutional questions which may appear to be well settled. First National Bk. & Trust Co. v. City of Evanston, 30 Ill. 2d 479, 197 N.E.2d 705; People v. Valentine, 60 Ill. App. 2d 339, 208 N.E.2d 595.

Plaintiff's argument that Sections 45(5) and 48 are unconstitutional is unsupported by reason or relevant authority. Instead, he has enumerated countless tenets of constitutional law which have been plucked out of context from an equally large number of cases. None of these propositions bear any relation to the present case, and we find that his contention has no merit.

As we have hereinbefore noted, plaintiff's Statement of Facts does not comply with our Rule 5(2)(k) (Supreme Court Rule 39). We have however considered the case on its merits and conclude that the trial court properly entered summary judgment for the defendants.

The judgment is affirmed.

Affirmed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.